APR 30 1981
ALEXANDER L. STEVAS,

No. 80-1233

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

SYUFY ENTERPRISES,

Petitioner,

v.

NORTHERN CALIFORNIA STATE ASSOCIATION OF I.A.T.S.E. LOCALS, LOCAL UNION NO. 241,

Respondent.

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I

INTRODUCTION

The Unions in their Memorandum in Opposition nowhere directly address or attempt to refute either of the two reasons established by Syufy in support of granting the Writ; namely, that the Ninth Circuit erred in refusing to review the arbitrability of the dispute, and that the Ninth

Circuit improperly authorized the arbitrator to exceed his contractual authority. Rather, the Unions attempt to obscure the principal issues before the Court with three irrelevant and unsupported arguments.[1/]

II

PETITIONER'S FIRST REASON IN SUPPORT OF THE WRIT CLEARLY GOES TO THE ARBITRABILITY OF THE DISPUTE, AND NOT TO ITS MERITS

The Unions first seek to avoid a proper consideration of Syufy's submission that the Ninth Circuit erred in refusing to

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1/ With respect to the Unions' counter-statement of the case, the side letter from the Union dated December 28, 1976 was never acknowledged or accepted by the Employer's representative. The Arbitrator, moreover, did not rely on that side letter in making his award. (See Petition for Writ of Certiorari, Appendix page 19).

consider the arbitrability of the underlying dispute, by mischaracterizing Syufy's petition as addressed to the merits of the award. This argument is clearly without foundation.

As indicated on page 3 of the Unions' Memorandum in Opposition, the arbitrator was faced with two issues. The first issue was whether or not the arbitrator had jurisdiction over the subject matter of the dispute. This is clearly a question of arbitrability. The second issue before the arbitrator concerned the merits of the dispute. The arbitrator ruled separately on the first issue, and when Syufy sought judicial review of that ruling on arbitrability, the Ninth Circuit denied review. It is the denial of that judicial review which Syufy submits as one reason for granting the Writ. The Union in its Memorandum

conveniently collapses the two issues into one, and mischaracterizes them as only involving the merits of the dispute.

The Unions cannot now transform the issue of arbitrability, treated separately by the courts below, into an issue of the merits. In Radio Corporation of America v. The Association of Scientists and Professional Personnel, 414 F.2d 893, 896 (3rd. Cir. 1969), the court stated:

> The Union contends that the issue we have isolated is properly one for the arbitrator and not for the court to determine because the controversy goes to the heart of the asserted grievance, We cannot agree. While the controversy does go to the heart of the asserted grievance, it does not follow that the Court is thereby precluded from discharging its obligation to determine whether the parties agreed to submit the particular dispute to arbitration. The Union cannot by couching its grievance in language of a contract construction problem prevent the Court from carrying out its duty. . . .

III

THIS CASE CLEARLY PRESENTS AN ISSUE CONCERNING THE REVIEWABILITY OF ARBITRABILITY ISSUES

The Unions concede on page 6 of their Memorandum in Opposition that there is a conflict among the circuits concerning whether judicial review of the arbitrability of a dispute is waived merely because a party has presented to the arbitrator the question of his own jurisdiction. The Unions further nowhere dispute that the Ninth Circuit's ruling below is in direct opposition to the majority rule adopted by courts in the First, Second, Third, Fourth, Fifth and Eighth Circuits, which holds that as arbitrability is principally an issue for the courts, judicial review of the arbitrability of a dispute is not waived merely by presenting the issue of arbitrability to the arbitrator, or by proceeding

on the merits.

Rather, the Unions inexplicably argue that Syufy did not raise any question of arbitrability to the arbitrator, although, as noted, the Unions show on page 3 of their Memorandum that the first issue before the arbitrator was "whether or not the Arbitrator has jurisdiction over Norwitt & Cine 21 and Vallejo Auto Movies." (Emphasis added). The Unions apparently misunderstand the basic concept of arbitrability. It is of course by now axiomatic that the question of whether or not an arbitrator has "jurisdiction" over the subject matter of the dispute is a question of the arbitrability of that dispute. United Steel Workers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

The Unions also do not dispute that the Ninth Circuit's position is contrary

to well-established Congressional policies favoring the resolution of industrial disputes through arbitration and the conservation of judicial resources. They do not deny that the Ninth Circuit's position requires a party to avoid arbitration in all cases until an initial resort to the courts is made to determine arbitrability. Rather, the Unions merely repeat that such an intermediate judicial step is permissible (although not preferred) under California law.

In summary, the Union does not and cannot deny that the Ninth Circuit's refusal to consider the arbitrator's jurisdiction is in conflict with the decisions of other courts of appeal, and is inconsistent with Federal policies which seek the resolution of disputes through arbitration and the conservation of judicial resources.

IV

SYUFY'S INITIAL PETITION TO VACATE THE ARBITRATOR'S AWARD WAS TIMELY FILED

The Unions also raise the argument that this Court has no jurisdiction to review the Ninth Circuit ruling as Syufy's initial petition to vacate was somehow not timely filed. It should be noted that at no point has the Union raised this issue, as properly required, in any of the proceedings below. Indeed, it was the Union who removed the action to Federal court. Nonetheless, it is clear that this argument is also without any merit.

As conceded by the Unions, Syufy filed with the arbitrator on August 22, 1977, a "Motion for Correction of Award and Reconsideration". By letter dated August 24, 1977, Counsel for the Unions requested additional time to respond to the motion. Based upon this request, the arbitrator

gave the Unions until September 16, 1977 to respond to Syufy's motion. On September 20, 1977, the arbitratior denied Syufy's motions. Syufy filed a petition to vacate the award in a California court on December 16, 1977.

Contrary to the Unions' contention, there is clear statutory authority that a motion for correction of an award does serve to toll the time within which to file a petition for court review. California Code of Civil Procedure, 1288.8 states:

> If an application is made to the arbitrator for correction of the award, the date of service of the award for purposes of this article [the time to file a petition for court review] shall be deemed to be whichever of the following dates is the earlier: (a) the date of service upon the petitioner of a signed copy of the correction of the award or of the denial of the application. (b) the date that such application is deemed to be denied under Section 1284.

California Code of Civil Procedure, Section 1284, which deals with motions for correction of an award, states in relevant part:

> The Arbitrator shall either deny the application or correct the award. . . If no denial of the application of the award is served within the thirty-day period provided in this section [30 days after service of the initial award]the application for correction shall be denied on the last day thereof.

Under either time limit as provided in Section 1288.8, Syufy's initial petition to vacate was timely. If the effective date is the date the denial was served (September 20, 1977), the petition was filed only 87 days after service. If the 30 day rule is used, then September 10, 1977 (30 days after the August 19, 1977 award) is the operative date and the petition to vacate was filed 97 days after service. Both dates are clearly within the 100 day time limit. Accordingly, the petition was timely filed.

The Court does have jurisdiction.

V

CONCLUSION

The Unions in their Memorandum in Opposition present absolutely no legitimate reasons why the Writ should not be granted in this case which involves important and reoccuring issues of federal labor law.

Respectfully submitted,

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April 29, 1981
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